

served in this capacity since the adoption of the Ethics in Government Act of 1978.

Most of those interviewed cite problems with the way the independent counsel process currently works and provide specific recommendations for improvement. Those of us in the Congress will soon have an opportunity to review this matter in greater detail for, as you may know, its current provisions, reauthorized and amended by the Independent Counsel Reauthorization Act of 1994, P.L. 103-270, June 30, 1994, will expire on June 30, 1999, unless reauthorized.

I ask unanimous consent to have this article printed in the RECORD and I thank my good friend Clifton Daniel of New York for calling it to my attention.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the New York Times August 11, 1998]

FORMER SPECIAL COUNSELS SEE NEED TO  
ALTER LAW THAT CREATED THEM

(By Todd S. Purdum)

They are a rarefied roster of not quite two dozen, the men and women who have served as independent counsels investigating high Government officials over the last 20 years. They have delved into accusations of everything from cocaine use by a senior White House aide to perjury, influence-peddling and favor-trading, and have produced decidedly mixed results, from no indictments to convictions to reversals on appeal.

Some of them have been harshly criticized for taking too long, spending too much or criminalizing conduct other prosecutors would most often not bother with. But as Kenneth W. Starr's investigation of President Clinton has moved from scrutiny of a tangled real estate investment to intimations of intimacy with an intern, the law that created independent counsels has come under attack as almost never before.

Interviews in the last week with seven of the people who have held the job since that law, the Ethics in Government Act of 1978, was adopted in the wake of Watergate produced broad consensus that the statute was needed but might have to be overhauled if it was to be renewed by Congress when it expires next year.

The former counsels were unanimous on one point: all were glad to have served. But a majority also said that as currently written, the law covered too many officials and too many potential acts of wrongdoing, and left the Attorney General too little discretion about when to invoke it.

"It should be limited to activities that occur in office," said Lawrence E. Walsh, who spent six years and \$40 million investigating the Iran-contra affair and whose suggestions for changes were among the most sweeping. "It should be limited to misuse of Government power and should not include personal mistakes or indiscretions. The enormous expense of an independent counsel's investigation and the disruption of the Presidency should not be inflicted except for something in which there was a misuse of power. That's not out of consideration for the individual; it's out of consideration for the country."

And while the former counsels generally declined to comment on Mr. Starr's investigation, virtually all of them also said that wide experience as a criminal prosecutor or

a defense lawyer—which Mr. Starr does not have—should be a requirement for the job.

"I believe strongly in the concept of an independent counsel to guarantee public confidence in the impartiality of any criminal investigation into conduct of top officials in the executive branch of our Government," said Whitney North Seymour Jr., who won a perjury conviction against Michael K. Deaver, a former top aide to President Ronald Reagan who was accused of lying about his lobbying activities after leaving office.

"However," Mr. Seymour continued, in comments generally echoed by his colleagues, "appointments to that position should be limited to lawyers with proven good judgment and extensive prior experience in gathering admissible evidence, developing corroboration and satisfying the trial standard of reasonable doubt. We simply cannot afford the spectacle of on-the-job training in such a sensitive position."

Since Arthur H. Christy was appointed in 1979 to investigate accusations that Hamilton Jordan, President Jimmy Carter's chief of staff, had used cocaine at Studio 54—a case that ended with no indictments—there have been a total of 20 independent-counsel investigations, some conducted by more than one prosecutor. The names of the targets of two investigations in the Bush era, and the counsels who conducted them, were sealed by court order. One investigator, Robert B. Fiske Jr., was appointed by Attorney General Janet Reno in 1994, at a time when the law had expired, and was replaced four years ago last week by a three-judge Federal panel that chose Mr. Starr instead, but Mr. Fiske had essentially all the same powers.

Five investigations of Clinton Administration officials, including Mr. Starr's, still await outcome, and Ms. Reno remains under intense pressure to ask the judicial panel for yet another independent counsel, to look into campaign finance abuses. No effort was made to interview those conducting active investigations, or the counsel who ended his investigation of Commerce Secretary Ronald H. Brown after Mr. Brown's death in a plane crash in 1996.

#### ENORMOUS POWER AND INTENSE ISOLATION

A common theme in the remarks of the seven former counsels who agreed to be interviewed was the momentous power and isolation of the job, a universe of solitude and solemn responsibility.

"In terms of individual power, I never had anything like this," said Mr. Walsh, who had served as a Federal district judge and Deputy Attorney General in the Eisenhower Administration. "Night after night, I'd wake up in the middle of the night. I kept a notebook by my bed, and the only way I could get back to sleep was to write down whatever was bothering me. I'd worry about my travel expenses, thinking, 'This is going to seem very high.'"

When Mr. Fiske set up shop to investigate Whitewater, he forsook the companionship of the only four friends he had in Little Rock, Ark., who all happened to be leading lawyers with ties to the city's political and legal establishment.

Scholarly critics of the independent counsel law, including a Supreme Court Justice, Antonin Scalia, have argued that it creates built-in incentives for prosecutors to pursue evidence and avenues of inquiry that law-enforcement officials might otherwise decide were never likely to bear fruit. Those incentives: simply the intense political pressure and public scrutiny that surround any appointment, and the requirement that the prosecutor produce a detailed report justifying all the effort.

That concern was also common among the former prosecutors themselves.

"There ought to be some way to limit the ability of an independent counsel to expand his or her investigation, to keep their eye on the original target they were initially appointed to investigate," said James C. McKay, whose conviction of Lyn Nofziger, a former Reagan aide charged with violating ethics laws on lobbying, was overturned on appeal after an inquiry that lasted 14 months and cost \$3 million. "When you think of how the Starr investigation started with Mr. Fiske and Whitewater and now what's become of it, it just seems that there should be some way to have prevented that from occurring."

Joseph DiGenova, who ultimately brought no charges after a three-year, \$2.2 million investigation into accusations that senior Bush Administration officials improperly sought information from Bill Clinton's passport files during the 1992 campaign, was the sole former prosecutor to condemn the law altogether, and he said it should not be renewed.

"All of the usual governors, both legal and practical, are absent, because of the special nature of the statute," said Mr. DiGenova, who argues that once the law is invoked, prosecutors are forced to bring "an unnatural degree of targeted attention" to the case.

#### DISCRETION THAT CUTS IN EITHER DIRECTION

Mr. Fiske, who like Mr. Walsh and Mr. DiGenova thinks any law should cover investigation of only the President, the Vice President and the Attorney General rather than the 75 or so senior Government and campaign officials now automatically covered, also worries about the potential for abuse.

"Once the person is selected, it's like recalling a missile," Mr. Fiske said. "You can't recall it, and it's kind of unguided, except by its own gyroscope. And so all these things are judgment calls."

But like his colleagues, he emphasized that a prosecutor's wide discretion ultimately cut both ways. He recalled that David Hale, a former municipal judge in Arkansas, having pleaded guilty and begun cooperating in the Whitewater case, provided much useful information, along with some that seemed far afield.

"There were a lot of other things that David Hale told us that we could have investigated under our charter," Mr. Fiske recounted, "but I just said, 'This is too far removed from what we were supposed to be doing.'"

Several of the prosecutors expressed concern that the current law led too easily to the appointment of independent counsels. Every time the Attorney General receives from a credible source specific allegations of wrongdoing by an official covered under the act, she has 30 days to decide, without compelling anyone's testimony, whether a preliminary investigation is warranted. If she concludes that it is, then she must decide within 90 days whether there are "reasonable grounds" to believe that further investigation is warranted. If there are, she must apply to the special three-judge court for appointment of an independent counsel.

"That time limit now is too brief," Mr. McKay said.

But one of the former prosecutors, who spoke only on the condition of anonymity, said that the law was sound as written and that complaints that it invited prosecutorial vendettas were overblown. Mr. Seymour also rejected complaints of unbridled power, saying he had had no more leeway as independent counsel than he had earlier had as United States Attorney in Manhattan in the Nixon Administration.

"The United States Attorney for the Southern District has almost unlimited

power," Mr. Seymour said. "How the responsibility is carried out is another question."

Similarly another former independent counsel, Alexia Morrison, said that the law did not need any major changes and that "there's been a very successful campaign to lay faults at the foot of the statute when in fact it is conduct that got us here." Asked whether she meant conduct by President Clinton, Mr. Starr or both, Ms. Morrison simply repeated her assertion.

It was Ms. Morrison's investigation into whether Theodore Olson, an Assistant Attorney General in the Reagan Administration, misled Congress in a dispute over toxic waste cleanup that led to the 1988 Supreme Court ruling unholding the independent counsel law. And though she ultimately brought no charges after a 30-month, \$1.5 million investigation, she, like some of her colleagues, said that very result underscored one of the most important features of the law: enhancing the public's confidence that nothing has been covered up.

"There are a heck of a lot of very troublesome investigations that have been resolved without bringing any criminal charges," Ms. Morrison said, "and there was not a situation in which anyone came back and said, 'That's outrageous.'"

Mr. Fiske, too, said that in the absence of an independent counsel law, there would seldom be significant public controversy if high officials were charged and brought to trial, whatever the outcome, but that "the problem is when the case isn't brought" because a prosecutor decides there is not enough evidence or likelihood of success. "In many respects," he said, "that is where you need the independent counsel most of all."

But for alleged misdeeds that may have occurred before a senior official took office, Mr. Walsh said, the independent counsel law should not apply. Rather, the solution should be to extend the statute of limitations for any such crimes and investigate after the official leaves office—a suggestion that Ms. Morrison seconded while acknowledging that this could pose its own problems, in terms of stale evidence or lost witnesses.

#### ONE COMMON THEME: DISDAIN FOR PARTISANSHIP

In one way or another, all the former counsels who were interviewed deplored the partisanship now surrounding an office that grew out of bipartisan concern over President Richard M. Nixon's "Saturday night massacre" of the first Watergate special prosecutor, Archibald Cox, and the two highest officials of the Justice Department.

"It's become so politicized now," Mr. McKay said, "that the ins hate it and the outs love it just for the purpose of bringing the ins down. That's the part that will turn the public sour."

Mr. Seymour agreed, saying: "It plainly has gotten a bad name. And that comes from the public perception of recent events, and I think that's unfortunate."

Mr. DiGenova contended that the aftermath of Mr. Cox's dismissal demonstrated that the independent counsel law was not needed, since the Watergate inquiry continued under a new special prosecutor, Leon Jaworski, until Mr. Nixon's downfall four years before the law was enacted.

"There's no way that a sitting President can possibly prevent his own investigation by firing anybody," Mr. DiGenova said, "because the political process will not permit it."

Ms. Morrison said it remained unclear whether the public would continue to support the law.

"I think most of the previous independent counsels have been able to achieve a result with a general sense of public confidence

that the way they got there was appropriate," she said. "But hold your breath. It may be that Starr can spin out a report that tells an incredibly interesting tale that puts the lie to most of the procedural and substantive assaults on him. On the other hand, if it looks like he hasn't produced so much, and has used an elephant gun on a flea, then maybe that won't be so well regarded."

"A Rarefied Roster", independent counsels, the years of their appointments and the results of their investigations.

1979, Arthur H. Christy, investigated accusations of cocaine use by Hamilton Jordan, chief of staff to President Jimmy Carter. No indictments.

1980, Gerald Gallinghouse, investigated accusations of cocaine use by Tim Kraft, President Carter's campaign manager. No indictments.

1981, Leon Silverman, investigated alleged mob ties of Raymond J. Donovan, Labor Secretary to President Ronald Reagan. No indictments.

1984, Jacob A. Stein, investigated alleged financial improprieties of Attorney General Edwin Meese 3d. No indictments.

1986, Whitney North Seymour Jr., won perjury conviction of Michael K. Deaver, former White House deputy chief of staff under President Reagan.

1986, Alexia Morrison, investigated accusations that former Assistant Attorney General Theodore Olson was deceptive about documents withheld from Congress. No indictments.

1986, Lawrence E. Walsh, investigated the sale of weapons to Iran and the diversion of some profits to Nicaraguan rebels. Obtained many convictions, some overturned on appeal, others leading to pardons by President George Bush.

1987, James C. McKay, won conviction of Lyn Nofziger for violating ethics law on lobbying. Conviction was overturned on appeal, and Mr. McKay decided not to retry case. Investigated Mr. Meese on accusations related to the collapse of Wedtech, a military contractor. No indictments.

1987, Carl Rauh, James Harper, investigated the finances of W. Lawrence Wallace, a former Assistant Attorney General. No indictment.

1989, Name of independent counsel and target sealed by court order. No indictment.

1990, Arlin M. Adams, Larry D. Thompson, investigated variety of scandals involving the sale of favors in the Department of Housing and Urban Development. Several indictments and convictions.

1991, Name of independent counsel and target sealed by court order. No indictment.

1992, Joseph DiGenova, investigated possible abuse of passport files by Bush Administration officials. No indictments.

1994, Robert B. Fiske Jr.,\* Kenneth W. Starr, conducted inquiry into Whitewater real estate deal, since expanded to include several other investigations, some still ongoing.

1994, Donald C. Smaltz, won indictment of former Agriculture Secretary Mike Espy on charges of receiving, and covering up, favors from companies doing business with the Government. Trial pending. Mr. Espy's former chief of staff was convicted of lying to investigators.

1995, David M. Barrett, investigated accusations that Henry G. Cisneros, the Secretary of Housing and Urban Development, lied to the F.B.I. about payments he made to a former mistress. Won indictment of Mr. Cisneros on 18 felony counts. Trial pending.

1995, Daniel S. Pearson, investigated Commerce Secretary Ronald H. Brown's personal

\*Appointed by Attorney General Janet Reno during a period when the independent counsel law had lapsed.

finances. Stopped after Mr. Brown was killed in a plane crash in Croatia.

1996, Curtis Emery von Kann, investigated Eli J. Segal for conflict-of-interest accusations involving fund-raising for a private group while he was head of the Americorps national service program. Investigation ended in 1997 without any action.

1998, Carol Elder Bruce, appointed to investigate whether Interior Secretary Bruce Babbitt broke the law in connection with his testimony to Congress about an Indian casino license.

1998, Ralph I. Lancaster Jr., appointed to investigate accusations that Labor Secretary Alexis Herman engaged in influence-peddling solicitation of \$250,000 in illegal campaign contributions.

#### MESSAGES FROM THE HOUSE

At 12:12 p.m., a message from the House of Representatives, delivered by one of its reading clerks announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 81. An act to designate the United States courthouse located at South Michigan Street in South Bend, Indiana, as the "Robert K. Rodibaugh United States Courthouse."

H.R. 1481. An act to amend the Great Lakes Fish and Wildlife Restoration Act of 1990 to provide for implementation of recommendations of the United States Fish and Wildlife Service contained in the Great Lakes Fishery Resources Restoration Study.

H.R. 1659. An act to provide for the expeditious completion of the acquisition of private mineral interests within the Mount St. Helens Volcanic Monument mandated by 1982 Act that established the Monument, and for other purposes.

H.R. 2000. An act to amend the Alaska Native Claims Settlement Act to make certain clarifications to the land bank protection provisions, and for other purposes.

H.R. 2314. An act to restore Federal Indian services to members of the Kickapoo Tribe of Oklahoma residing in Maverick County, Texas, to provide trust land for the benefit of the Tribe, and for other purposes.

H.R. 3381. An act to direct the Secretary of Agriculture and the Secretary of the Interior to exchange land and other assets with Big Sky Lumber Co. and other entities.

H.R. 4068. An act to make certain technical corrections in laws relating to Native Americans, and for other purposes.

H.R. 4558. An act to make technical amendments to clarify the provision of benefits for noncitizens, and to improve the provision of unemployment insurance, child support, and supplementary security income benefits.

The message also announced the House has agreed to the following concurrent resolution, in which it requests the concurrence of the Senate:

H. Con. Res. 315. Concurrent Resolution expressing the sense of the Congress condemning the atrocities by Serbian police and military forces against Albanians in Kosova and urging that blocked assets of the Federal Republic of Yugoslavia (Serbia and Montenegro) under control of the United States and other governments be used to compensate the Albanians in Kosova for losses suffered through Serbian police and military.

The message further announced that the House has passed the following bill, with amendments, in which it requests the concurrence of the Senate:

S. 1355. An act to designate the United States courthouse located in New Haven,